Equity No. 3926

# In the District Court of the United States for the District of Massachusetts

FRANKLIN PROCESS COMPANY

*v.*

HOOSAC MILLS CORPORATION

## REPLY BRIEF FOR THE UNITED STATES


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## CITATIONS

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## REPLY BRIEF FOR THE UNITED STATES

### ISSUE RESTATED

The Government reiterates its position that the sole question presented is whether Congress had the power to enact those provisions of the Agricultural Adjustment Act under which the processing and floor stocks taxes now sought to be collected from the Hoosac Mills Corporation are imposed. The receivers may not question the constitutional validity of provisions of the Act other than those relating to the processing and floor stocks taxes. It is elementary that a statute is subject to attack only by one who is affected thereby and only with respect to such provisions of the statute as are alleged and proved to have affected him. See *Walsh* v. *Columbus &c. Railroad Co.*, 176 U.S. 469; *Smiley*

v. *Kansas,* 196 U.S. 447, 457; *Mountain Timber Co.* v. *Washington,* 243 U.S. 219, 242; Section 14 of the Agricultural Adjustment Act, as amended. It follows that the scope of the receivers' argument must be limited to the contentions that the *tax itself* is an invalid imposition, and/or that *its proceeds* are unlawfully appropriated because destined for expenditure in effectuating unconstitutional action. This, the Government contends, is the definite area within which the controversy must be confined.

## CONTENTIONS OF THE RECEIVERS ANSWERED

### I

**The processing and floor stocks tax provisions here in question are not in conflict with the tenth amendment**

**A. The receivers contend that the provisions complained of are not measures enacted for the purpose of raising revenue but are rather attempts, through the disguised use of the taxing power, to regulate and control activities outside the scope of Federal power; that is, the business of manufacturing cotton**

This argument of the receivers is most explicitly stated on pages 54–55 of their brief in which it is said of the tax complained of:

> It is not an Act to raise revenue. * * * The taxing power cannot be invoked to support legislation designed chiefly to regulate business.

citing *Hill* v. *Wallace,* 259 U.S. 44, and *Bailey* v. *Drexel Furniture Co.,* 259 U.S. 20. An examination of the operation and effect on the receivers of the processing and floor stocks taxes will demon-

strate the unfounded nature of the first proposition and the inapplicability to the situation here presented both of the second statement and of the authorities cited in its support. Clearly the processing and floor stocks tax provisions are true revenue measures rather than regulations both in purpose and effect. This may plainly be seen by an analysis of the invalid legislation with which the receivers seek to equate it.

*Hill* v. *Wallace,* 259 U.S. 44, involved a statute imposing a tax of twenty (20¢) cents a bushel on all contracts for the sale of grain for future delivery, which excepted from its application sales on boards of trade designated as contract markets by the Secretary of Agriculture, on fulfillment by such boards of certain conditions and requirements set forth in the Act. In *Bailey* v. *Drexel Furniture Co.,* 259 U.S. 20, the Court had before it a tax of ten (10%) percent on the net profits of any company hiring children under fourteen (14) years of age, but excepting from the tax a manufacturer who employed such persons in the belief, founded on certain specified evidence, that they were older. In holding these taxes invalid the Court declared that the measures were palpably not measures intended to result in revenue (and merely incidentally discouraging activities normally subject only to State control) but rather were detailed, coercing regulations, enforced by a penalty (in the form of a tax) upon departures from the standard of doing busi-

ness set up by Congress. Thus in *Bailey* v. *Drexel Furniture Co., supra,* the Court said (p. 36):

> It (the tax) provides a heavy exaction for a departure from a detailed and specified course of conduct in business.

and in *Hill* v. *Wallace,* 259 U.S. 44, at page 66:

> The manifest purpose of the tax is to compel boards of trade to comply with regulations, * * *. The Act is in essence and on its face a complete regulation of boards of trade, with a penalty of 20¢ a bushel on all "futures" to coerce boards of trade and their members into compliance.

A review of the criteria set up in these decisions, distinguishing an invalid regulation enforced by a penalty from a *bona fide* tax, compels the conclusion that the processing and floor stocks taxes bear no resemblance to the former type of legislation. On the analysis presented in the cases invoked by the receivers a regulation enforced by a penalty has the following characteristics: The statute sets up an express and specific *standard* by which the business of the taxpayer is to be conducted; refusal to conduct the business *in the given manner* entails the imposition of the "tax"; a showing that a violation of the standard is not accompanied by *scienter* avoids the "tax"; the Act either shows on its face or its title expressly states that its purpose is to regulate the business of the taxpayer in certain stated particulars through the incidence of the excise on those who fail to comply; *the Act re-*

*sults in no revenue* because its inevitable object and effect is to suppress the activities taxed.

The complete absence of these indicia in the tax now before the court is indisputable. The processing and floor stocks tax provisions display not one element aiming at or even tending to regulate the mode of doing business of the taxpayer. The statute sets up no standards according to which the business of manufacturing is to be conducted and, of course, no exemption is granted to a taxpayer who can show the absence of *scienter;* all processors no matter how they conduct their business are subject to the excise; no type of activity in the business of the manufacturer is either encouraged or discouraged through the incidence of tax.

But regulation necessarily implies a prohibition or at least the discouragement of certain modes of doing business. *Hammer* v. *Dagenhart,* 247 U.S. 251. See also: *Ryan* v. *Amazon Petroleum Corporation,* 71 F. (2d) 1, 5 (C.C.A. 5th). Since this feature is totally lacking in the instant measure, it can in no sense be called a regulation but must be recognized to be a valid tax.

That Congress had in mind the raising of revenue in enacting the processing tax provisions is not in doubt. The bill originated in the House, as do all revenue bills. House Rep. No. 6, 73rd Cong., 1st Sess., p. 3, states:

> The bill, however, makes provision for raising additional revenues for the Treasury * * *.

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Page 5 of the Report, under the heading "Processing Taxes" also states:

> In order to provide additional revenues for the Government the bill requires that there shall be levied processing taxes * * *.

Moreover, the title of the Act and the processing tax provisions, themselves (Section 9 (a)), declare the purpose to be to raise revenue for extraordinary expenses incurred by reason of the national economic emergency. Furthermore the taxing provisions of the Act have all of the earmarks of a revenue measure, for they contain provisions relative to assessment, collection, refund and suit ordinarily associated with such a measure (Section 19 (b)). In addition, the receivers have taken occasion to complain of the use made of such *revenue*. Besides the fact that there is in the statute no vestige of an intent to regulate the taxpayer, the Act, in its practical operation, negates any inference that it is not primarily designed to raise revenue.

In contrast to the taxes condemned in *Hill* v. *Wallace* and *Bailey* v. *Drexel Furniture Co., supra,* the instant measure is clearly designed to bring in revenue and in fact does so. It has been seen that the principal vice of the taxes declared invalid in the cases cited by the receivers was that they could not be deemed to be *bona fide* revenue measures because their inevitable effect was to suppress the activities subject to the tax. Clearly this contention

cannot be made in the instant case. Are our opponents prepared to argue that the purpose and effect of the processing tax provisions is to discourage by a penalty the processing of basic commodities, or that the taxes cannot be called revenue measures because they fail to bring in money? Obviously the facts fail to sustain such a position.

The complete impregnability of the processing and floor stocks taxes to attack on the ground that they are not taxes but disguised regulations becomes even more apparent when a review is made of taxes which the Supreme Court has sustained against objections on this score. Thus, in *Veazie Bank* v. *Fenno,* 8 Wall. 533, the Court sustained a tax on state banks, the obvious purpose and actual effect of which was to drive them, or at least their circulation, out of existence, with the words, "The judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers." Similarly, although the tax levied by Congress upon oleomargarine when colored so as to resemble butter was so great as inevitably to prohibit its manufacture and sale, it was held in *McCray* v. *United States,* 195 U.S. 27, that any inquiry into the purpose of an act which apart from that purpose was within the power of Congress, must be excluded. Finally, in *United States* v. *Doremus,* 249 U.S. 86, the Court held proper, against the objection that it was a disguised regulation, an act imposing a special tax

on the manufacture, sale, or gift of opium which required every person subject to the special tax to register with the Collector of Internal Revenue and forbade him to sell except upon the fulfillment of certain conditions. The decisions in *Bailey* v. *Drexel Furniture Co.* and *Hill* v. *Wallace, supra,* do not overrule these cases because the Court there explicitly reaffirmed the holdings last mentioned. The following statement in *United States* v. *Doremus, supra,* is then still law (pp. 93, 94):

> And from an early day the Court has held that the fact that other motives may impel the exercise of federal taxing power does not authorize the courts to inquire into that subject. If the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it. * * *
>
> The act may not be declared unconstitutional because its effect may be to accomplish another purpose as well as the raising of revenue. If the legislation is within the taxing authority of Congress—that is sufficient to sustain it. * * *
>
> Considering the full power of Congress over excise taxation the decisive question here is: *Have the provisions in question any relation to the raising of revenue?* * * * (Italics supplied.)

But even the receivers do not go so far as to claim that the alleged regulation is directly upon processors of cotton. All they say is that (Br. 60):

> The regulation intended by the Act is * * * *indirectly,* through the tax, upon manufacturing. (Italics supplied.)

It cannot be denied, however, in the face of the expressed intention of Congress as it appears in the Committee Report and in the title and Section 9 (a) that the direct purpose of the provisions in question was revenue. That being the case, it follows, *a fortiori,* that an *indirect* regulation, which we deny exists, cannot under the *Doremus* decision serve to defeat the efficacy of these provisions as a revenue measure.

In the *Veazie, McCray* and *Doremus* cases, the purpose of the measures involved could not have been to bring in revenue and the effect of the tax was necessarily to control activities ordinarily limited to state regulation. In the first, state bank notes were suppressed; in the second, oleomargarine of a certain color was driven off the market; in the last, the excise was merely the occasion for the imposition of drastic and highly specific standards on those subject to the tax. Yet in each case the action of Congress was sustained on the ground that the conditions to the exercise of the taxing power having been satisfied, no further limitations could be put upon that acknowledged power.

If the court in these instances declined to hold the statutes unconstitutional as disguised regulations of activities subject only to state supervision, how can the taxes in the instant case said to be invalid on this score when their clear purpose and effect is solely the raising of revenue and they in no manner or degree regulate the business of the taxpayer?

In this connection, it might be observed that the receivers state (Br. 65): "This tax amounts to as much or more than the gross profit that can be expected from manufacturing." The record furnishes absolutely no basis for this statement. As a matter of fact, it is obvious that the tax constitutes only a very small percentage of either the value or price of the manufactured article.

**B. The receivers also contend that the use of the proceeds of the processing and floor stocks taxes for rental and benefit payments to reduce agricultural production is obnoxious to the Tenth Amendment in that it effects a regulation beyond the scope of the delegated powers**

This argument of the receivers is most clearly stated on page 53 of their brief where it is said:

> The Agricultural Adjustment Act attempts to regulate the various agricultural pursuits in a manner, not only unprecedented, but revolutionary. It arms the Secretary of Agriculture with enormous financial power, which enables him to pay those who conform to his wishes and to withhold payment from those who do not.

In view of the entirely voluntary character of benefit and rental payments under the Act, the argument that agriculture is regulated through them need not long engage the attention of the Court. That regulation necessarily involves coercion has repeatedly been recognized. *Hammer* v. *Dagenhart,* 247 U.S. 251; *Bailey* v. *Drexel Furniture Co.,* 259 U.S. 20; *Hill* v. *Wallace,* 259 U.S. 44. Moreover, the Supreme Court has had little difficulty in disposing of the objection that a measure may amount to a regulation though submission to it be purely optional. In *Massachusetts* v. *Mellon,* 262 U.S. 447, the Court had before it a statute providing for a federal appropriation to be apportioned among such of the States as would accept and comply with its provisions. It was there strongly contended that the Act invaded the rights of the States by imposing upon them an unconstitutional option either to yield to the Federal Government a part of their reserved rights or to lose the share which they would otherwise be entitled to receive of the moneys appropriated. The Court said (pp. 480, 482, 483):

> Probably, it would be sufficient to point out that the powers of the State are not invaded, since the statute imposes no obligation but simply extends an option which the State is free to accept or reject. * * *
>
> Nor does the statute require the States to do or to yield anything. If Congress enacted it with the ulterior purpose of tempting them to yield, *that purpose may be effec-*

> *tively frustrated by the simple expedient of not yielding.* * * *
>
> In the last analysis, the complaint of the plaintiff State is brought to the naked contention that Congress has usurped the reserved powers of the several States by the mere enactment of the statute, *though nothing has been done and nothing is to be done without their consent;* * * *. (Italics supplied.)

That the rental and benefit payment system under the Act is purely voluntary is evident not only from the completely contractual nature of the relation thus set up between the farmer and the Government, but from the fact that actually large numbers of agricultural producers have chosen not to come into the scheme. In theory and in practice the benefit payment system, it must be concluded, lacks the *sine qua non* of regulation—coercion—and any attempt thus to characterize this use of the proceeds of the processing taxes must therefore fall.

**C. It is also insisted that the processing and floor stocks taxes are invalid since they fix prices of the cotton manufacturer—a business not affected with a public interest—and invade rights reserved to the States by the Tenth Amendment**

This is urged by the receivers on page 52 of their brief, where it is said:

> Even state legislatures may not fix prices at which commodities may be sold unless the business or property involved is most clearly affected with a public interest.

In support of this proposition *Tyson & Brother* v. *Banton,* 273 U.S. 418, is cited. It is submitted that the briefest examination of this decision and the line of cases of which it is an example will at once disclose the fundamental inapplicability of the concept of price-fixing to the processing and floor stocks taxes. In this decision, the Court passed on a statute forbidding the resale of any ticket to any theatre at a price in excess of fifty (50¢) cents in advance of the price printed on the face of such ticket. In other words, the statute fixed a maximum price at which the ticket could be sold. The term "price-fixing" has, in fact, been inseparably associated with the establishment of a maximum or minimum price at which a given commodity may be sold from the time of *Munn* v. *Illinois*, 94 U.S. 113, to *Nebbia* v. *New York,* 291 U.S. 502, decided March 5, 1934. It would be gratuitous to point out that the measure complained of is entirely devoid of these characteristics. Can it be claimed that the Act requires the receivers to sell their product at any given price or that they are not at liberty either to give it away or to demand any price they may desire for it? Clearly the argument that this is a price-fixing measure is as unfounded as the contention that any regulation is involved in the imposition of the taxes in question. If the mere imposition of a tax constitutes price-fixing, then all taxes must fall under the ban, for

any tax inevitably affects the price of the commodity sold. The palpable absurdity of such a position is its own answer.

Since the processing and floor stocks tax provisions can in no sense be called price-fixing measures, and since it has been conclusively demonstrated that the taxes here in question display in no degree any of the characteristics of regulations in purpose or effect, it is clearly unnecessary to consider either the question of regulation of business affected with a public interest, or, in fact, any question relating to the scope of federal power as opposed to state power under the Tenth Amendment. Following the language of the Court, on page 93, in *United States* v. *Doremus, supra,* all that is required to validate the provisions of the Act in question is that they have "some reasonable relation to the exercise of the taxing authority conferred by the Constitution." This, it is insisted, they unquestionably do. As *bona fide* exercises of the taxing power of the Federal Government, the taxes in controversy must comply only with the requirements laid down in the Constitution. These criteria, it is submitted, they fully satisfy.

## II

**The processing and floor stocks taxes are excises and therefore need not be apportioned. Since they also satisfy the requirement of uniformity throughout the United States they are a valid exercise of the Federal taxing power**

**A. The receivers on pages 74–76 of their brief, urge that the processing tax is not an excise but a direct tax because it is imposed on any first processing of cotton**

The position of the receivers is that while a tax on certain types of processing of a commodity would be an excise, a tax on all possible processings of a commodity is a tax on the property and therefore a direct tax. For the position that the processing tax is a direct one the receivers rely upon the case of *Dawson* v. *Kentucky Distilleries Co.,* 255 U.S. 288. That case, as the Government has pointed out on pages 21–22 of its original brief, held that a state tax on the withdrawal of whisky from bond, wherein it had been required by law to be placed when first manufactured, was a direct tax for purposes of applying state constitutional provisions. The court pointed out that this tax was different from others which had been termed excises, because the owner could at no time exercise any possessory interest in the whisky without paying the tax.

In order to make this decision relevant the receivers analyzed the processing tax on cotton in the following words (Br. 75):

> Is the situation any different in this case where lint cotton, although not impounded,

> cannot be embarked even on the first step toward gainful use without paying the tax?

In answer the following decisions may be cited: *Veazie Bank* v. *Fenno,* 8 Wall. 533, where a tax on the circulation of state bank notes was held to be an excise. The only gainful use of bank notes was their circulation and therefore under the receivers' contention the tax upon them would be a direct tax. However, the Supreme Court held otherwise.

The case of *Patton* v. *Brady,* 184 U.S. 608, upheld as a valid excise a tax on all manufacture of tobacco. In *Spreckles Sugar Refinery Co.* v. *McClain,* 192 U.S. 397, 412, the tax upheld in *Patton* v. *Brady* was described as follows:

> That the tax imposed by the Act of June 13, 1898, upon tobacco, however prepared, manufactured and sold, for consumption and sale, was not a direct tax, but an excise tax which Congress could impose; that it was not a tax upon property as such but upon certain kinds of property, having reference to the origin and intended use.

Therefore the decision in *Patton* v. *Brady* may be said to be a direct holding, that a tax imposed on all manufacture of a given commodity is an excise.

Furthermore in *Billings* v. *United States,* 232 U.S. 261, a tax upon any use of foreign-built pleasure vessels was held to be an excise. The receivers seek to distinguish the holding of this case on page 76 of their brief by the argument that if the use

was not for purposes of pleasure no tax was imposed. In point of fact, there was no use which could be made of the vessel which was not subject to tax. In the present situation the tax is not as broad, for one may sell the lint cotton abroad, as 60% of the domestically produced lint cotton is sold, and have it manufactured there without the payment of this excise tax. In other words, the Supreme Court in the *Billings* case upheld a tax imposed on more incidents of ownership than the present processing tax covers and yet denominated such tax an excise. Therefore the Government again concludes that the processing tax is an excise.

**B. The receivers contend, on page 78 of their brief, in reference to the floor stocks taxes that "if the tax is upon the articles, no matter how described, it is a direct tax on property"**

In reference to this argument the receivers assert that the case of *Patton* v. *Brady,* 184 U.S. 608, which upheld a tax on manufactured tobacco held for sale is inapplicable. To prove its inapplicability the following statement is made by receivers (Br. 79):

> The words of the decision, "It is not a tax on property as such, but upon certain kinds of property having reference to their origin and their intended use," metaphysical and unsatisfactory at best, become positively misleading in the changed circumstances.

It is difficult to understand how the receivers can contend that *Patton* v. *Brady* is not a direct hold-

ing upon the point in question. The statute under consideration in that case imposed an increased tax on the processing of tobacco. In order to equalize matters, the statute proceeded to impose a tax on such tobacco as had been already manufactured and then was being held for sale, because it would escape the increased tax on tobacco yet to be manufactured. The floor stocks tax effects the same result. Since the processing tax was imposed on the processing of cotton, cotton goods which, having already been processed, would escape the tax, are taxed when held for sale. Therefore no distinction can be found between the two statutes involved except that one dealt with tobacco and the other with cotton.

On page 78 of their brief the receivers claim that "dissension has already split the ranks of the Government itself" as to whether the floor stocks tax is a "sales" or "held for sale" tax. This is not so. All the Government's brief does is to present the matter in the alternative (p. 19–23). Whether a sales tax or held for sale tax, the tax is none the less an excise tax.

**C. The receivers on pages 80–81 of their brief deny the uniformity of the processing tax because, according to their assertion, "the Act thus specifically authorizes, and even directs, the fixing of one rate of tax for Georgia cotton and another rate of tax for South Carolina cotton"**

The receivers have reference to the provision in Section 11 of the Agricultural Adjustment Act, as amended, which permits the Secretary to exclude

from the operation of the processing tax any regional or market classification, type or grade of a basic commodity. It is, as a matter of fact, not the interpretation of the Administration that the word "regional" would permit the choosing of cotton grown in one state for taxation and the freeing of that in another, but that "regional" has reference to some species or variety of the basic commodity. By no stretch of the imagination can the *direction* mentioned by the receivers be found in the language of the statute.

However, the Government shall not further enlarge upon this point, but at present calls the attention of the Court to the fact that, as the receivers have admitted on page 81 of their brief, no regional classifications of cotton were in effect at the time the present taxes became due and none have been adopted to date. Therefore, the receivers are in effect contending that they fear an unconstitutional regulation on the part of the Secretary of Agriculture. In the first place, it is not apparent how an unconstitutional order in the future would affect the receivers' liability for past taxes; and, secondly, it has been a continuing rule of the courts that they will not anticipate an unconstitutional act on the part of an administrative officer, but will assume that he will always act constitutionally. When in *Gilchrist* v. *Interborough Co.,* 279 U.S. 159, the Supreme Court had before it a case in which the plaintiffs anticipated and wished to enjoin an al-

legedly unconstitutional act on the part of a Public Service Commission, the Court dismissed the action, and informed the plaintiffs that they would have to await the action of the administrative officer before urging its unconstitutionality. The Court would not assume in advance that an unconstitutional administrative order would be issued. This doctrine had already been asserted in *Prentis* v. *Atlantic Coast Line,* 211 U.S. 210, and *Henderson Water Co.* v. *Corporation Commission,* 269 U.S. 278. Therefore, the Government contends that the issue that the Secretary of Agriculture might by administrative order determine upon such classifications of cotton with reference to the imposition of the processing taxes as to make such taxes unconstitutional should not be considered in this action.

## III

**The powers delegated to the Secretary of Agriculture with reference to processing and floor stocks taxes are not legislative in character; he is called upon merely to perform essentially administrative functions which Congress may assign with propriety to an executive officer**

**A. The receivers contend that the powers vested in the Secretary of Agriculture by the terms of the Act are so broad as to be invalid**

In support of their position the receivers urge that the decision in *Field* v. *Clark,* 143 U.S. 649, does not support so broad an administrative power (Br. 23–25). This we do not admit, but even if the assertion be true, it does not establish that other

decisions do not support such a grant of power. However, this Court in its recent decision in *Doherty* v. *McAuliffe,* 7 F. Supp. 49, 55, in quoting from *Field* v. *Clark, supra,* pointed out the true distinction between a constitutional and unconstitutional grant of power to administrative officers. Following the distinction outlined, the taxing provisions of the Act here in question do not delegate to the Secretary the power to make the law, but on the contrary confer upon him authority for their excution "to be exercised under and in pursuance of the law." Adopting further the language, on page 693 of *Field* v. *Clark, supra,* what the Secretary "was required to do was simply in execution of the Act of Congress. It was not the making of law. He was the mere agent of the law making department to ascertain and declare the event upon which its expressed will was to take effect. It was a part of the law itself as it left the hands of Congress that" certain taxes to be determined by a prescribed formula were to be in effect upon the ascertainment and declaration by the Secretary of a certain indicated event.

On page 70 of the receivers' brief the Secretary's powers are described as follows:

> He may determine when the tax becomes effective.
>
> He may determine the commodities to which it applies.
>
> He may determine the rate of tax.

> He may increase or reduce the rate from time to time.
>
> He may determine when the tax ceases.
>
> Furthermore, under Section 9 (b) in order to fix the rate he is to determine the difference between the current average farm price and the fair exchange value, but he is not bound by that rule. After certain formalities he can fix it at such rate as will prevent an accumulation of surplus stocks and depression of the farm price of the commodity.

First, it should be pointed out that the provision referred to in Section 9 (b) as permitting the Secretary to change the rate from that derived by use of the formula set up in the Act, does not allow him to fix any other rate he pleases, but permits him only to *lower* the rate below that provided by the formula, and then only in accordance with the terms of the Act. Second, in performing these functions, as was said in *Field* v. *Clark, supra,* he was acting merely as the agent of the lawmaking department to ascertain and declare the event and facts upon which its expressed will was to take effect.

But, if the decision in *Field* v. *Clark, supra,* did not go far enough to support the present powers vested in the Secretary, the decision in *Hampton & Co.* v. *United States,* 276 U.S. 394, which is discussed at length on pages 47 to 50 of the Government's original brief, will support the powers which

the receivers enumerate. If the Secretary may by the instant statute determine when the processing tax becomes effective, so could the President under that case determine when an increase in the tariff should take effect. In addition, the power to determine the commodities to which the orders changing the rates should apply, was present in the delegation sanctioned in the *Hampton* case, and in both the cases the rate of tax had only an upper limit. Furthermore, under both statutes the President and Secretary are empowered to change in accordance with the terms thereof the rate from time to time or to rescind their orders completely.

**B. The receivers contend (Br. 68–70) that the indefiniteness of the formula used to determine the rate of the processing tax is such that it furnishes no standard restraining the Secretary in the exercise of his discretion**

The receivers seem to be of the opinion that whereas the President in the *Hampton* case was limited in setting the rate by a maximum deviation of 50% from the existing rates, the fact that the Secretary of Agriculture must use a more complex formula will serve to distinguish the cases. It is interesting to note in this connection that in *Avent* v. *United States,* 266 U.S. 127, discussed on pages 50 and 53 of the Government's original brief, no formula at all was given by statute. The Agricultural Adjustment Act not ony contains a formula but as shown at great length beginning on page 33 of the Government's brief, this formula presents a

very definite standard. Assuredly, the formula is no less definite than that provided in Sections 327 and 328 of the Revenue Acts of 1918 and 1921 and considered in *Heiner* v. *Diamond Alkali Co.,* 288 U.S. 502.

In elaborating on the indefiniteness of the formula set forth in the Act in question, the receivers on pages 71 and 72 of their brief assert that the statistics involved are not definitely indicated by the Act. However, the Secretary was confined by Section 9 (c) to "available statistics of the Department of Agriculture" and this reference, as has been shown by the evidence, could have meant only one set of statistics in the possession of the Department. Therefore, the reference cannot be said to be vague by anyone who is cognizant of the facts which Congress had before it when it passed the Act. It is accordingly concluded that the *Field, Hampton, Avent* and *Heiner* cases cited above support the propriety of the powers vested in the Secretary of Agriculture by the Act and that no unconstitutional delegation has taken place.

In this connection it should be pointed out that the receivers undertake (Br. 72) to belittle the affidavits, introduced in evidence by Government counsel (Ex. 3), which affidavits, among other things, deal with the statistics available to the Secretary and referred to in the Act. This is hardly fair considering the fact that the Government had five expert witnesses available to testify at the

hearing of this case, and that counsel for the receivers agreed to accept the affidavits mentioned in lieu of the testimony of the witnesses. Furthermore, counsel specifically accepted the statements in the affidavits as true, objecting only to their relevancy (R. 9, 25a). In fact, the only objections the receivers had to the Government's evidence during the entire hearing was from the standpoint of its relevancy (R. 7, 9, 10) to the issues involved.

**C. The receivers declare (Br. 68) that the Hampton decision constitutes no precedent for the instant measure because the discretion vested in the executive officers in dealing with foreign commerce may be broader than that in relation to internal affairs**

The receivers, apparently fearing the effectiveness of the *Hampton* decision, *supra,* attempt to distinguish it by asserting on page 68 of their brief that broader discretion may be vested in executive officers when dealing with reference to the tariff and international affairs than in dealings with respect to internal affairs. The receivers cite no cases for this distinction and apparently there are none. Indeed, the broadest instance of delegation of power appears to be the power vested in the Interstate Commerce Commission by the statute under consideration and approved in *Avent* v. *United States, supra.* There the regulation of interstate commerce was the subject matter of the statute. Another delegation of power almost as broad as that in the *Avent* case was that conferred upon the Commissioner of Internal

Revenue in reference to excess profits taxes and was upheld in *Heiner* v. *Diamond Alkali Co., supra,* and in the other cases appearing on page 35 of the Government's brief. Furthermore, in the *Hampton* case itself the following language appears on page 409 of the Court's opinion:

> It is conceded by counsel that Congress may use executive officers in the application and enforcement of a policy declared in law by Congress, and authorize such officers in the application of the Congressional declaration to enforce it by regulation equivalent to law. But it is said that this never has been permitted to be done where Congress has exercised the power to levy taxes and fix customs duties. The authorities make no such distinction.

Here will be found the answer to the receivers' position. In the very case on which the receivers rely, the court in coupling taxes and tariffs, when stating that there is no distinction between the discretion which may be vested in officers for carrying into operation different types of statutes, has forestalled the interpretation offered by them.

Therefore, the Government maintains its original position that the discretion vested in the Secretary is valid and does not render the processing and floor stocks tax provisions in question unconstitutional; that the plan adopted by Congress for carrying the statute into operation was the only practical one; that the standards set out are sufficiently

definite to place an upper limit on the rate of tax; and that Congress was fully justified by the decisions of the Supreme Court, especially that of *Hampton* v. *United States, supra,* in permitting the Secretary to determine when the tax should go into effect and at what times it should be changed.

## IV

**The use of the proceeds from processing and floor stocks taxes for the purposes designated in the Agricultural Adjustment Act is not class legislation but is an appropriation of these funds to a public purpose in the interest of the general welfare and as such is authorized by the Constitution**

**A. The receivers assert that the taxing provisions here in question constitute class legislation and an application of public moneys to private ends since funds collected thereunder are expended in the form of rental and benefit payments for the advantage of the class of farmers**

This objection is urged in the brief for the receivers, among other places, on page 39, where it is said:

> Viewed as a whole and its purpose given full weight, it takes from one class, namely the manufacturer, and gives to another, namely, the producer of the basic agricultural commodity.

And again on page 35:

> * * * until and unless counsel for the United States shall show to us legislation comparable to this legislation, we shall not allow ourselves to be troubled by our failure to find, among the reported cases, adjudica-

> tions specifically denying the right of Congress to penalize one class for the immediate profit of another.

In view of the time-honored and unquestioned status as law of the decisions by the United States Supreme Court discussed below sustaining legislation not only "comparable to this legislation" but on all fours with it, the receivers may indeed be concerned. But the use of the proceeds of the taxes in question, far from being an effort to *penalize* one class for the immediate profit of another, has for its objective a public purpose in the name of the general welfare. In reference to state legislation in this connection, the Supreme Court has repeatedly recognized the fact that where the welfare of certain groups of individuals is a matter of public concern, the use of taxes or other compulsory exactions to redistribute the benefits and burdens within a given industry is valid—although the furtherance of the general welfare incidentally involves the payment of the proceeds of the tax to private individuals. Thus in *Mountain Timber Co.* v. *State of Washington,* 243 U.S. 219, 238, an act establishing a state fund for the compensation of workmen injured in certain industries, the fund being supplied by assessments upon each employer of definite percentages of his pay roll, was declared to be valid. It was there argued that the act was class legislation and that employers were deprived under it of property without due process of law because they were

unconditionally required to make payments to the fund for the individual benefit of their employees. The assessments were upheld, however, on the ground that the object of the legislation—payment of compensation to injured workmen—was "of general and public moment, rather than of private and particular interest." Can it be said that the welfare of the entire class of producers of basic agricultural commodities, which is fundamentally related to the economic welfare of the nation as a whole, is of less "general and public moment"? It was upon this economic structure which the Supreme Court in *Home Building and Loan Association* v. *Blaisdell,* 290 U.S. 398, 442, said "the good of all" depended.

*Noble State Bank* v. *Haskell,* 219 U.S. 104, is another case in which the Court scouted the imputation of class legislation where the class to be benefited constituted such an integral part of the economic structure that its rehabilitation was intimately connected with the welfare of the public as a whole. That decision involved an Oklahoma statute which levied upon every bank an assessment of a percentage of the bank's average profits for the purpose of creating a guaranty fund to make good the losses of depositors in insolvent banks, the fund being created by a special imposition in the nature of an occupation tax upon all banks existing under the laws of the state. The Court there did not

linger long over the objection that the act took property for a private use. On page 110, it said:

> * * * it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use. * * * And in the next, it would seem that there may be other cases *beside the everyday one of taxation,* in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume. * * * (Italics supplied.)

The general advantage to be derived from restored confidence in the banking system was thus declared to be a public end which the incidental private benefits accruing under the statute could not vitiate. Clearly the same principle must apply in the instant situation, where the gain of producers of basic agricultural commodities in the form of rental and benefit payments is but part of a comprehensive system whereby the depression which has burdened every economic activity of the nation is to be ameliorated.

It may be noted that even these explicit precedents (arising under the Fourteenth Amendment) for the legislation here in question need not be invoked to sustain the processing and floor stocks taxes against this attack of the receivers. The receivers tacitly admit in their brief (p. 29) that the

Fifth Amendment has never been applied to limit federal appropriations. The attention of the Court is respectfully called to pages 54–61 of the Government's original brief in which is fully established the proposition that the use which Congress makes of the proceeds of taxation is not properly a subject of judicial review.

Furthermore, it is well settled that a payer of federal taxes has not, merely by virtue of such capacity, any right to a decree enjoining the expenditure of federal funds. His individual interest in federal expenditures is too small to give him any standing to call in question the authority for such expenditures before a court of equity. *Massachusetts* v. *Mellon,* 262 U.S. 447. The mere fact that in the present case the taxpayer is questioning the validity of the disbursement by resisting a claim for taxes filed by the Government in receivership proceedings can make no difference, for here as in the *Mellon* case, the taxpayer is relying on the same elements of individual interest and of damage in order to justify his attack on the appropriation, i.e., his capacity as a federal taxpayer. And all the reasons stated by Mr. Justice Sutherland in the *Mellon* case (quoted at pages 58, 59 of the Government's principal brief) for denying the taxpayer injunctive relief apply with equal force to the instant situation. The "attendant inconvenience" will be quite as great if any federal act involving the outlay of public money may be attacked merely

by setting up the invalidity of the outlay as a defence to an action to collect taxes, as if expenditure under an appropriation may be attacked by a bill for an injunction. The two situations are *in pari materia.*

The receivers (Br. 28) seek to distinguish the *Mellon* case by stating that "the taxpayer who had brought the suit had no specified interest in the litigation, nor had been, or was about to be, mulcted of a tax, the proceeds of which would be subjected to the appropriation complained of." The attempted distinction is without foundation. The plaintiff in the *Mellon* case alleged, as her basis of interest for attacking the appropriation, that she was "a taxpayer of the United States." Precisely the same capacity is relied on by the receivers to justify their attack on the appropriations in the Agricultural Adjustment Act. Since the plaintiff in the *Mellon* case was a federal taxpayer the sums collected from her had been covered into the Treasury of the United States. The appropriation in the *Mellon* case was made out of the general funds in the Treasury, so it is plain that the plaintiff there *had* been "mulcted" of a tax the proceeds of which would be subject to the appropriation complained of. Similarly, the taxes here sought to be collected from the receivers are to be paid into the Treasury and will become part of the general funds of the Government. Section 19 (a), Agricultural Adjustment Act, as amended. Since the two situa-

tions are in all relevant particulars identical, the receivers cannot here, any more than could the plaintiff in the *Mellon* case, question the authority for disbursements under the appropriation. In fact, it would appear in all fairness that the receivers would have less right to question the appropriation than did the plaintiff in the *Mellon* case. As indicated, in that case the tax had been paid and the plaintiff had satisfied her obligation to the Government. It is entirely within the range of reason that her contribution by way of taxes in return for the benefit derived from the scheme of mutual protection, though infinitesimal compared to the total revenues collected, nevertheless was of sufficient import to enable her to maintain the action instituted by her. But the Supreme Court said no. But here, as argued by the receivers at the hearing (R. 57, 58, 59), the incidence of the taxes in question has been or will be passed on to the consumer. What possible interest then, under these circumstances, could they have in the disposition of the proceeds therefrom? If the plaintiff in the *Mellon* case had no *locus standi* it follows, *a fortiori,* the receivers do not have here.

By refusing to pay the taxes in question in reliance upon their claim that the disposition to be made of the proceeds is unconstitutional, the receivers have in effect tried to do what the Supreme Court in the *Mellon* case said they may not do, namely, enjoin an expenditure of money by the

Congress. In a very recent case (*O'Brien* v. *Carney,* 6 F.Supp. 761) this Court has stated the rule as follows (p. 762):

> The doctrine which sometimes allows a taxpayer to enjoin the wrongful expenditure of money by a municipality has no application in suits to enjoin agencies of a state or federal government.

Assuming, *arguendo,* that inquiry may be made into the objects for which Congress appropriates funds derived from taxation, it is demonstrated in the Government's original brief (pp. 62–93) that the expenditure challenged is an appropriation for a public purpose in the interest of the general welfare. It is there demonstrated that the powers granted the Congress to appropriate tax monies is not limited to appropriations for fulfillment of the enumerated powers but that Congress has broad powers to give financial support to any project of national concern. It is also there shown that the Act, by the elimination of agricultural surplusages and the consequential restoration of the purchasing power of the farming communities of the nation for industrial products, attempts to effect a resurgence of industrial and commercial activity. That this project is aimed at the economic welfare of the whole nation is unmistakable and, indeed, instead of the object being denied by the receivers, it is admitted (Br. 31, 44, 83). As a matter of fact the receivers concede (Br. 40) that some "benefits may

conceivably inure to the general welfare" as a result of the tax provided by the Act. See also page 5 of the receivers' brief. Despite this, however, the central object of attack is Section 8 (1) of the Act, as amended, providing for the renting of surplus acreage to take it out of production and for making benefit payments to farmers to cause them to reduce their production for market—on the ground that such expenditures are devoted to private purposes. The answer given to this argument in the previous brief for the Government may well be quoted here:

> What are the indicia of private character in these expenditures? Is a systematic and uniform reimbursement for sacrificed crops to all farmers of basic commodities throughout the nation a private purpose? Is it private in nature to seek the voluntary cooperation of the nation's farmers in eliminating a choking overproduction? Or is it supposed that a public aim is not to be sought by payments to individuals for a *quid pro quo* essential to the national welfare? Such a position is wholly untenable. Whenever the Government pays for its requirements, the payments are of necessity to individuals. The fact that incidental private benefits are conferred will not vitiate expenditures for a public purpose. *Noble State Bank* v. *Haskell,* 219 U.S. 104; *Fallbrook Irrigation District* v. *Bradley,* 164 U.S. 112; *O'Neill* v. *Leamer,* 239 U.S. 244.

The receivers (Br. 5, 36) while criticizing the evidence introduced by the Government establishing what the Agricultural Adjustment program *has* already accomplished for the public welfare, nevertheless do not hesitate, in their effort to establish the unconstitutionality of the taxing provisions, to paint a dark and sinister *future* picture in prophecy of its ultimate failure (Br. 64, 65, 72, 84). In this connection the receivers undertake to discuss the wisdom of the enactment and quote from the dissenting opinion of Mr. Justice McReynolds in *Nebbia* v. *New York,* 291 U.S. 502, (Br. 82) as authority for this undertaking. But the majority opinion in that very case stated, at page 447 of the report: "Whether the legislation is wise or unwise as a matter of policy is a question with which we are not concerned."

This rule has been specifically applied in Revenue cases. In *Patton* v. *Brady,* 184 U.S. 608, 620, 621, the Court said:

> The legislature must therefore determine all question of state necessity, discretion or policy involved in ordering a tax * * *. "The judicial tribunals of the State have no concern with the policy of legislation. * * *."

As a final reply to the contention of the receivers that the use of the proceeds of the processing taxes for rental and benefit payments is class legislation since they inure to the individual advantage of pro-

ducers of basic agricultural commodities, the language of the court in *Coster* v. *Tidewater Co.,* 18 N.J.E. 518, 523, 524, is adopted:

> The legislative power is not competent to take the property of A and transfer it to B, simply for the benefit or convenience of B, because such an act has no public aspect; it concerns and affects, exclusively, the two individuals. In such case, it would be within the authority of the judiciary to pronounce such transfer unconstitutional and void. *But if the sequestration of the property of A will, to a material extent, be serviceable to the public at large, whether such sequestration shall take place, must be committed, as a pure matter of discretion, to the legislature,* provided such discretion be exercised in good faith, and does not rest, incontrovertably, upon a false foundation. Applying this rule to the facts of the present case, it seems to me that no person can deny that the decision which the legislature has made, to the effect, that the project provided for in the Act, at present considered, is an authorized act of legislative authority, has in it elements of public utility, and that, consequently, this court has not the power to review such decision. * * * The object proposed, and for which provision is made in the statute under review, being, then, one tending to the benefit of the community at large, must be regarded, upon principles which are too valuable to social interests to be disturbed, as coming conclusively under

> legislative control. The objection raised on this foundation in the argument, consequently, is not solid. (Italics supplied.)

Contrary to the charge of the receivers (Br. 87–88), the Government in its original brief did not nor does it now undertake to justify the taxing provisions of the Agricultural Adjustment Act on the unsound premise that an emergency enlarges the delegated powers of Congress. Its position is entirely in harmony with the decision of the Supreme Court in *Home Building and Loan Association* v. *Blaisdell,* 290 U.S. 398, referred to by the receivers (Br. 10, 58). The Court said (p. 426):

> While emergency does not create power, emergency may furnish the occasion for the exercise of power.

All the Government says (original Br. 16) is that the taxing provisions of the Act are well within the taxing power of Congress (which the receivers unqualifiedly admit is unusually broad, Br. 9, 10) as set forth in Article I, Section 8, Clause 1 of the Constitution and that a grave national emergency, above everything else, would certainly furnish a special occasion for the full use of such power, and for this position there is ample authority.

> *Home Building and Loan Association* v. *Blaisdell,* 290 U.S. 398, 426; *United States* v. *Spotless Dollar Cleaners, Inc.,* 6 F. Supp. 725, 732 (S.D.N.Y.); *United States* v. *Calistan Packers,* 4 F. Supp. 660, 661 (N.D.Cal.); *Campbell* v. *Chase National Bank,* 5 F. Supp.

156, 167 (S.D.N.Y.); affirmed (C.C.A. 2nd), not yet reported.

In answer to the receivers' final proposition that the Act is contrary to the spirit of the Constitution, attention is again directed to *Home Building & Loan Association* v. *Blaisdell, supra,* wherein Chief Justice Hughes speaking equally as eloquently as did Mr. Justice Davis in *Ex parte Milligan,* 4 Wall. 2, cited by the receivers (Br. 88), gave utterance to the growing recognition of public needs and the relation of the individual right to public welfare. He said (pp. 442, 443):

> It is manifest from this review of our decisions that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very bases of individual opportunity. Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the State itself were touched only remotely, it has later been found that the fundamental interests of the State are directly affected; and that the question is no longer merely that of one party to a contract as

against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends.

It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—"We must never forget that it is a *constitution* we are expounding" (*McCulloch* v. *Maryland,* 4 Wheat. 316, 407)—"a constitution intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs." Id. p. 415. When we are dealing with the words of the Constitution, said this Court in *Missouri* v. *Holland,* 252 U.S. 416, 433, "we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters . . . The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."

In the present case Congress has called into activity its taxing authority in an effort to rescue agriculture and to safeguard the economic structure. Surely, in the light of our whole experience, this exercise of its constitutional power to protect the fundamental interests of society, and upon which "the good of all depends" cannot be deemed unjustified. Both the means and the end are entirely legitimate and conform fully to the spirit and purpose of the Constitution (Receivers' Br. 44).

## CONCLUSION

The Government, having met and disposed of the objections raised by the receivers in their answering brief, recapitulates its original position. It is respectfully submitted that the Congress in the Agricultural Adjustment Act has levied taxes which are excises and which are uniform throughout the United States. In so doing no delegation of legislative authority to the Secretary of Agriculture has been effected. The receivers cannot attack the validity of the taxes by questioning the purposes for which they have been levied. However, even assuming that they may do so, since the taxes are expended for the general welfare of the United States, the Congress properly exercised its power to tax.

The Court is therefore respectfully requested to order the payment of the sum of eighty-one thousand six hundred ninety-four dollars and twenty-

eight cents ($81,694.28), together with interest thereon.

Respectfully submitted,

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